Smallholders Corp Sdn Bhd & Ors v Utusan Transport Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D5-28-145-1995
KAMALANATHAN RATNAM JC
6 OCTOBER 1995

Companies and Corporations *— Winding-up — Whether one could use a petition instead of a writ where there is a non-disputed debt — Companies Act 1965 s 218*

Contract *— Formation — Whether contract binding — In the absence of fraud or misrepresentation the party signing it is bound — It is wholly immaterial whether he has read the document or not and despite the fact that the defendant was ignorant of the English language*

A petition was filed in respect of an alleged sum of RM293,000 owed by the respondents to the petitioners. The petitioners also seek, inter alia, the winding-up of the respondents and the appointment of the Official Receiver. There were mainly three issues; ie whether the respondents were correct in contending: (1) that the petitioners have no locus; (2) that the respondents did not understand the contents of a letter which the respondents had signed upon the request of the petitioners; and (3) that since there was no judgment in the present case the respondents had a good defence to the petition.

Held, granting an order in terms of prayers sought in the petition:

(1) There was no evidence to support the contention that since both the petitioners were subsidiaries of a government body, the petitioners therefore had no locus in the present case.

(2) Even if the respondents' representative did not understand the contents of the letter in question then such a contention ought to have been taken at the first available opportunity and not after three and a half months when the respondents wrote through their solicitors making no reference to this letter. The respondents cannot now resile from their own agreement which they took time to deliberate upon.

(3) When documents containing contractual terms are signed then in the absence of fraud or misrepresentation the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

(4) Despite the fact that the defendant was ignorant of the English Language he would be bound by the written contract entered into by him in the absence of fraud or misrepresentation.

(5) In this case no plea of fraud or misrepresentation has been raised and the respondent is bound by his own admission.

(6) A petition for winding-up cannot be resorted to to settle a disputed debts and that the proper course was for the petitioner to file a civil suit for determining the disputed claims.

(7) In the present case there was no dispute as to the debt nor the amount due and the petitioners had resorted to the proper course to settle this claim.

[Bahasa Malaysia summary

Suatu petisyen telah difailkan berkenaan dengan jumlah sebanyak RM293,000 yang dikatakan dihutang oleh penentang-penentang kepada pempetisyen-pempetisyen. Pempetisyen-pempetisyen juga menuntut, antara lain, penggulungan penentang-penentang dan perlantikan Pegawai Penerima. Terdapat tiga isu utama, yakni sama ada penentang-penentang betul ketika berhujah: (1) bahawa pempetisyen-pempetisyen tidak mempunyai locus; (2) bahawa penentang-penentang tidak memahami kandungan suatu surat yang ditandatangani oleh penentang-penentang setelah diminta oleh pempetisyen-pempetisyen; dan (3) bahawa oleh kerana tidak ada penghakiman dalam kes sekarang, penentang-penentang mempunyai pembelaan yang baik terhadap petisyen itu.

Diputuskan, memberikan perintah seperti dipohon dalam petisyen:

(1) Tidak ada bukti untuk menyokong penegasan bahawa oleh kerana kedua-dua pempetisyen adalah anak syarikat kepada badan kerajaan, oleh itu pempetisyen-pempetisyen tidak mempunyai locus dalam kes sekarang.

(2) Walaupun wakil penentang-penentang tidak memahami kandungan surat yang menjadi persoalan, tegasan ini perlu dibuat semasa peluang pertama yang ada dan bukannya selepas tiga bulan setengah apabila penentang-penentang menulis melalui peguamcara mereka tanpa membuat rujukan kepada surat ini. Penentang-penentang tidak boleh sekarang menarik diri daripada perjanjian mereka sendiri yang mana mereka mengambil masa untuk mempertimbangkannya.

(3) Apabila dokumen-dokumen mengandungi terma-terma kontrak ditandatangani, tanpa fraud atau salah nyata, pihak yang menandatanganinya adalah terikat, dan adalah langsung tidak penting sama ada beliau telah membaca dokumen itu atau tidak.

(4) Walaupun defendan tidak tahu Bahasa Inggeris, beliau terikat dengan kontrak bertulis yang dimasukinya tanpa fraud atau salah nyata.

(5) Dalam kes ini, tidak ada fraud atau salah nyata yang ditimbulkan dan penentang adalah terikat dengan pengakuannya sendiri.

(6) Petisyen untuk penggulungan tidak boleh digunakan untuk menyelesaikan pertikaian hutang dan cara yang wajar adalah pempetisyen memfailkan guaman sivil untuk memutuskan tuntutan-tuntutan yang dipertikaikan.

(7) Dalam kes sekarang, tidak ada pertikaian mengenai hutang ataupun jumlah yang perlu dibayar dan pempetisyen-pempetisyen telah menggunakan cara yang wajar untuk menyelesaikan tuntutan ini.]

Notes

For cases on winding-up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570; [1993] *Mallal's Digest* 379–393; [1994] *Mallal's Digest* 614–647; [1995] *Mallal's Digest* 442–472.

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600; [1993] *Mallal's Digest* 471–472; [1994] *Mallal's Digest* 751–754; [1995] *Mallal's Digest* 547–550.

Cases referred to

Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd)
Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113 (folld)
Subramaniam v Retnam [1966] 1 MLJ 172 (folld)

Legislation referred to

Companies Act 1965 s 218

ET Soon (*Abdul Hamid Said & Associates*) for the petitioners.
Fakihah bte Azari (*Nik Hisham, Ainul Azam & Fakihah*) for the respondent.
Rozaidah bte Hj Othman for the Official Receiver.

Kamalanathan Ratnam JC: This is a petition filed pursuant to s 218 of the Companies Act 1965. The petition states that the respondent, although served with the notice of demand failed, refused and/or neglected to pay the sum of RM293,000 or any part thereof. The petitioners seek the winding-up of the respondents, the appointment of the Official Receiver and the usual consequential relief regarding costs.

An affidavit in reply was filed by one Haji Ali bin Jaffar, the Administrative Director of the respondents wherein he denied that the respondents owned the petitioners the sum claimed and further contended that the petitioners had no locus to file this petition. The respondents also contended that they had spent a sum of RM287,219.40.

The petitioners filed an affidavit in reply to the above through Haji Wan Ahmad Shabari bin Hj Wan Mohamad and exhibited a letter dated 18 July 1994 and marked as exh HWAS-1 from the petitioner's

solicitors M/S Abdul Hamid Said & Associates and addressed to the respondents. Exhibit HWAS-1 confirmed that the respondents admitted having received RM352,940 and that the respondents agreed to the following terms:

1 That on or before 31 July 94 they would pay a sum of RM52,940.

2 That the balance of RM300,000 is to be paid in instalments of RM7000 per month until full settlement.

3 That the monthly payments would be made on or before the last day of each month.

4 That in default of items (1)–(3) above the full sum will become due and payable.

5 That the petitioner's solicitor's costs would be paid by the respondents.

Exhibit HWAS-1 concluded with a request for the respondents to sign their agreement and to return the same with their cheque for RM52,940.

The respondents made payment of RM52,940 on 20 July 1994 by issuing a cheque for RM41,003.50 and setting off the balance of RM11,936.50. They also made a further first instalment payment of RM7,000 There was therefore a balance of RM293,000.

The respondents then filed another affidavit in reply through Haji Ali bin Jaafar wherein they agreed that the agreement signed betweeen the respondents and one Nars Co Properties Sdn Bhd hereinafter referred to as the said agreement was an agreement by the latter to purchase shares of the respondents and that it was not a joint-venture agreement.

The respondents averred that the petitioners had no locus to bring these proceedings as the petitioners' winding-up proceedings is based on the said agreement to which they were not parties. The respondents also denied the terms of the letter dated 18 July 1994 exh HWAS-1. Although the respondents agreed signing the said letter dated 18 july 1994 they denied agreeing to the contents of the said letter nor to the implications contained in the said letter.

The respondents contend that upon being explained the implications by their counsel they wrote a letter dated 7 December 1994 (exh AJ-3) denying the contents of the letter dated 18 July 1994 (exh HWAS-1). The respondents also relied on the fact that there was no judgment as yet against them.

The petitioners replied by way of a further affidavit through Haji Wan Ahmad Shabari bin Haji Wan Muhamad and contended that vide letter dated 18 July 1994 the respondents were given sufficient time to consider and sign the said letter and that the respondents returned the signed copy on 20 July 1994.

The petitioners referred to exh HWAS-4 in their affidavit which was a voucher from the client's account of their solicitors showing a payment out of the sum of RM41,003.50 to the petitioners.

Mr Soon for the petitioners submitted that there were three issues relating to this petition in that whether the respondents are correct in saying:

(1) That the petitioners have no locus.

(2) That the respondents did not understand the contents of the letter dated 18 July 94 although they had signed the same.

(3) That since there is no judgment in this case they have a good defence to the petition.

The respondent's counsel Puan Fakihah agreed that these were the three issues that she too would like to address the court on:

Issue 1

Mr Soon submitted that the letter dated 18 July 94 referred to Tuan Haji Abdan bin Abu who was a representative of the second Petitioner and to Tuan Hj Wan Ahmad Shabari bin Hj Wan Mohamad who was a representative of the first petitioner and that the representative of the respondents had signed at p 2 of the said letter agreeing to the terms contained in the said letter. In the circumstances it was his contention that the Petitoners had locus and he relied on s 217 of the Companies Act 1965.

The respondents in arguing that the petitioner had no locus contended that the said agreement dated 22 November 90 formed the basis for the petitioners presenting this Petition because both the petitioners were subsidiaries of a government body, ie RISDA. However, she readily conceded to a question by the court that there was no evidence to support such a contention.

I find that if the respondents' representative did not understand the contents of the letter dated 18 July 1994 then such a contention ought to have been taken at the first available opportunity and not after about three and a half months when the respondents wrote through their solicitors their letter dated 7 December 1994 (exh AJ-3). The respondents cannot now resile from their own agreement which they took time to deliberate upon.

Further the petitioner's counsel submitted that the said agreement had indeed been rescinded and this was denied by the Respondent's counsel. However, when she was referred to encl 9 para 14 which was the respondents, own affidavit, which referred to the said agreement being cancelled, she contended that the agreement referred to in para 14 was not the same agreement referred to in encl 13 and exhibited as AJ 1. However when shown that they were indeed the same agreement she conceeded rightly that both the exhibits referred to the same agreement. In the circumstances I hold that the respondents' contention that the petitioners lacked locus is devoid of merits.

Issue 2

The respondent's statement that their representative did not understand what he was actually signing when he signed the letter dated 18 July

1994 is unacceptable. The respondents argue that as soon as the implications of the contents of the said letter dawned upon them they instructed their solicitors to write a letter dated 7 December 1994 (exh AJ-3) to object to the contents of the said letter. However, counsel for the respondent readily conceeding that their letter dated 7 December 1994 made no reference at all to the letter dated 18 July 94.

With regard to the payments made by her clients to the petitioner's solicitors for which exact sum receipts were issued and which exact sum was paid out to the petitioners by their solicitors, the respondents argued that such payments were in respect of payments due to the other parties.

However, it is clear that the solicitors for the petitioners had banked in the said sum into their client's account bearing their file reference No AHS/L/430/94, and this clearly means that the payments in respect of this account and relating to the petitioners and respondents and to no other parties.

In *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 it was held that when documents containing contractual terms are signed then in the absence of fraud, or misrepresentation the party signing it is bound, and it is wholly immaterial whether he has read the document or not and in *Subramaniam v Retnam* [1966] 1 MLJ 172 it was held that despite the fact the defendant was ignorant of the English language he would be bound by the written contract entered into by him in the absence of fraud or misrepresentation.

In this case no plea of fraud or misrepresentation has been raised and the respondent is bound by his own admission.

Issue 3

The respondent's counsel conceeded that when she took this issue what she meant was that a proceeding under s 218 of the Companies Act 1965 was an extreme measure and that it was open for the petitioners to have proceeded by way of a writ. In support of her view she cited *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58.

But it would seem that Shankar J (as he then was) in deciding the case held that a petition for winding-up cannot be resorted to, to settle disputed debts and that the proper course was for the petitioner to file a civil suit for determining the disputed claims.

I hold that in this present case there is no dispute as to the debt nor the amount due and I further hold that the petitioners have resorted to the proper course to settle this claim.

I therefore make an order in terms of prayers (a), (b) and (c) of the said petition.

Order accordingly.

Reported by Alexandra Wong